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No. 95-65

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JAMES L. HOOPER, M.D, et al.,

Petitioners,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., et al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. Does the decision of the United States Court of Appeals for the Fourth Circuit in *Hooper v. Montgomery Medical Group, P.A., et al.*, Nos. 93-2631, 94-1022, 94-1038, 94-1056, 94-1141, rest on any proposition of law which creates an actual conflict between the United States Circuit Courts of Appeals so as to warrant the exercise by this Court of its jurisdiction by writ of certiorari?

2. Does the decision of the United States Court of Appeals for the Fourth Circuit in *Hooper v. Montgomery Medical Group, P.A., et al.*, Nos. 93-2631, 94-1022, 94-1038, 94-1056, 94-1141, involve any conflicting principals the settlement of which are of importance to the public as distinguished from these particular parties, so as to warrant the exercise by this Court of its jurisdiction by writ of certiorari?

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JAMES L. HOOPER, M.D., et al.,
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PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., et al.,
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On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A., et al., hereby oppose the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *James L. Hooper, M.D. v. Montgomery Medical Group, P.A., et al.*, Nos. 93-2631, 94-1022, 94-1038, 94-1056, 94-1141 (affirmed by unpublished per curiam opinion).

RESTATEMENT OF THE CASE

Petitioner has propounded a statement of facts that Respondents find to be replete with misstatements. In compliance with Rule 15, Respondents are compelled to draw the Court's attention to such misstatements of fact by way of the following supplementation:

MMG was a professional corporation which operated as such (A. 2); the individual Respondents were shareholders in MMG and not "partners"(A. 2 et seq.); Respondents did not promise Dr. Hooper that he would remain President pending the satisfaction of any loan (A. 3); Respondents did not harass Dr. Hooper in any fashion (A. 3); Dr. Hooper waived any objection to Dr. Withrow's election as President of MMG by affirmatively participating in the unanimous vote to elect her (A. 3); Respondents did not agree to Dr. Hooper's unilateral "Leave of Absence" (A. 4, 5); Respondents exercised good faith in their efforts to separate from Dr. Hooper (A. 5); Respondents did not retaliate in any manner against Dr. Hooper for filing a claim with the United States Equal Employment Opportunities Commission (A. 6).

REASONS FOR DENYING THE WRIT

The Decision of the United States Court of Appeals for the Fourth Circuit in the Case of *James L. Hooper, M.D. v. Montgomery Medical Group, P.A., et al.*, Nos. 93-2631, 94-1022, 94-1038, 94-1056, 94-1141, which Petitioners Seek to Review Herein by Certiorari, Rests on No Proposition of Law Which Creates an Actual Conflict Between the United States Circuit Courts of Appeals. It Involves No Conflicting Principals the Settlement of Which is of Importance to the Public As Distinguished From These Particular Parties. Therefore, Jurisdiction in this Court to Review it is Lacking.

The jurisdiction of the Supreme Court of the United States is strictly limited. The questions presented by Petitioners herein fail to assert issues which satisfy either of the jurisdictional elements necessary to support the issuance of a writ of certiorari by this Court.

"The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes; first to secure uniformity of decision between and among those courts, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort." *Magnum Import Co. v Coty*, 262 U.S. 159, 163, 43 S.Ct. 531, 67 L.Ed. 922

(1923). Rule 10 of the Rules of the Supreme Court of the United States provides in pertinent part:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are **special and important reasons** therefor . . ."[1]

In the Petition for Writ of Certiorari, Petitioners James L. Hooper ("Hooper") and his "of counsel," Petitioner Allen H. Sachsel, Esquire ("Sachsel") have completely failed to demonstrate how this Court's review will impact anyone other than the immediate parties to this particular litigation. They have asserted that this Court's review is special and important *to them*. The Supreme Court does not sit for the benefit of particular litigants. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955) (citations omitted). Jurisdiction in this Court is not exercisable merely to give the defeated party in the Circuit Court of Appeals another hearing. *See, Magnum Import Co. v Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

In determining whether to grant a writ of certiorari, this Court uses the aforestated criteria. Confusion

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[1] The full text of Rule 10 reads as follows:

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right,

(1 continued) but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's judicial power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court of a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

stemming from glaring conflicts between decisions of the United States Courts of Appeals, or a striking deviation from the acceptable and usual course of judicial proceedings may call the Supreme Court's supervisory power into play. Similarly, the protection of the unity of decisions relating to federal questions is a factor evaluated by this Court in determining whether its jurisdiction is appropriate. Neither issue now posed comes close to satisfying the necessary criteria to warrant this Court's attention.

I. Age Discrimination

In Question I, Hooper has challenged the unwavering assessment of both the District Court and the Fourth Circuit Court of Appeals on the sufficiency of the evidence presented to survive summary judgment. He claims that both courts erred, and that his evidence was sufficient as a matter of law to withstand summary disposition. The Supreme Court has previously stated that the granting of a writ of certiorari would not be warranted merely to review evidence or the inferences drawn from that evidence. *See, General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178, 58 S.Ct. 849, 82 L.Ed. 1273 (1938). As long as the record supports the factual findings of the courts below, the Supreme Court will not disturb such findings. *See, Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1924) dismissing a writ which initially alleged issues of public importance but

later turned out to be an argument over the sufficiency of evidence.

Hooper continues to discuss facts which the courts below found irrelevant to the alleged discrimination claim.[2] His evidence was presented and re-presented in excruciating detail in both courts below. Specifically, Hooper suggests that he was a victim of disparate treatment by Respondents[3] and was offered "emeritus" status with the Respondent corporation which, if true, apparently somehow suggests age animus. The probative value of these factual allegations was fully considered and discussed by the trial court, and reviewed in detail by the appellate court. Both courts examined Hooper's evidence, examined Respondents' evidence and confirmed that even with every

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[2] Hooper has not challenged the lower courts' rulings regarding the other causes of action he pursued below. Therefore, only the discrimination claim is addressed herein.

[3] His claim is based on purported medical misconduct by one respondent, which conduct he claims was excused. At no time was Hooper's medical competence at issue. Therefore, the fact that another doctor was not dismissed for unproven allegations of medical misconduct is entirely irrelevant to Hooper's discrimination claim. This finding was confirmed in both courts below (A.1, 19, 32).

reasonable inference resolved in his favor, Hooper lacked sufficient evidence to create a genuine issue of material fact warranting the denial of summary judgment. Hooper's allegations were found to be of no relevance to his discrimination claim. They are of no greater relevance or importance to the public as a whole.

Hooper suggests (albeit in a footnote) that "confusion in and within the circuits" exists regarding the evidentiary value of alleged discriminatory comments in an employment setting.[4] In fact, there exists no confusion between the circuits regarding a plaintiff's obligation to marshall sufficient *relevant* evidence to prosecute his case, especially in a summary proceeding. It is unimportant whether the alleged remark is classified as circumstantial, direct or indirect evidence of discriminatory animus if the remark itself is insufficient to support a cause of action regardless of its label.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), a case cited by Petitioners (Br. 16), this Court recognized that an alleged discriminatory comment may be probative but not dispositive. Notwithstanding the presence of a stray remark, a plaintiff must still produce evidence sufficient to

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[4] *See*, Footnote 27, Petitioners' Brief in Support of a Writ of Certiorari, P.17 (all references to Petitioners' Brief are hereinafter designated "Br. __").

support each and every element of a discrimination action. Hooper failed to do so. For example, he failed to present *any* evidence that he was replaced by a younger person - a required element of his action. As a matter of law, therefore, his case lacked the evidence necessary to permit the case to proceed to trial.

Hooper claims that the courts below have confused a defendant's evidentiary obligation in a discrimination case and by so doing, have somehow jeopardized future litigants.[5] However, the District Court appropriately acknowledged that a defendant's burden is one of production, not persuasion, and that the ultimate burden of persuasion lies squarely with a plaintiff (A. 36 - 37).

Furthermore, in an employment discrimination context, a plaintiff must not only present evidence of a discriminatory motive, but must also be able to prove that adverse employment action resulted from that motive. Even if a prima facie showing is made, all defendants need do is articulate "legitimate nondiscriminatory reasons" for their action. *Parker v. Federal Nat. Mtg. Ass'n.*, 741 F.2d 975, 978 (7th Cir. 1984). Such reasons were articulated in this case. Respondents offered ample evidence to show a nondiscriminatory purpose behind their decision to terminate Hooper. The record is replete with ample

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[5] Hooper has not explained exactly what importance this alleged "confusion" will have for the public.

evidence of his hostile conduct - conduct which had nothing to do with his age, yet which Respondents found detrimental to the Respondent corporation. When the burden of production shifted back to Hooper, he could provide no additional evidence to rebut Respondents' position. Without some evidence that Respondents' position was pretextual, Hooper had no case. As a result, the trial court determined that there existed no genuine dispute as to any material fact.

Hooper simply failed to meet his burden of persuasion at the summary judgment stage. This failure lacks the requisite importance to confer Supreme Court review. His argument that one stray remark must be evidentially categorized is nothing more than a final attempt to have another court review the same flimsy "facts" he offered at the trial court level. The issue lacks precedential importance, and confers no value to the public at large. Hooper's argument is silent as to how review in this Court will ultimately resolve "some real and embarrassing conflict of opinion and authority" below. *See, Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923). As this Court has made clear:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way . . . In such situations we should "adhere to the usual rule of non-interference" where conclusions of

> Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.

National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951) (citation omitted). Clearly, this Court's "rule of non-interference" is utilized in cases where the record is capable of more than one factual interpretation. In this case, where the record is so thoroughly devoid of factual support for Hooper's claims, and where both courts below used reasonable and "fair-minded" approaches to review and dispose of this vexatious litigation, the jurisdiction of this Court must be denied.

II. Sanctions

In Question 2 A., Sachsel has challenged the District Court's imposition of Rule 11 sanctions against him as well as the Fourth Circuit's affirmance of those sanctions. Sachsel primarily alleges that the Fourth Circuit was "constrained" to review the imposition of sanctions under an abuse of discretion standard and that somehow the review should have been *de novo* (Br. 23).[6] Undaunted

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[6] The Fourth Circuit Court of Appeals did not review the sanctions issue in a vacuum as Sachsel suggests. Rather, it conducted a *de novo* review of the summary judgment issues. That review provided the Court's foundation to assess the District Court's imposition of sanctions against Sachsel for signing Plaintiff's Opposition

by the repeated findings that his conduct was vexatious and in contravention of Federal Rule 11, and apparently unmoved by the affirmance of those sanctions, Sachsel made these same arguments in a Petition for Rehearing. That Petition was denied (A. 80). He now tries to get this Court to vindicate him. However, Sachsel has failed to allege how Supreme Court review will impact anyone *other* than him. He has also failed to allege any conflict among the circuits on this standard of review.

Sachsel further claims that an impermissible "Catch 22" is created when an "abuse of discretion" standard is used to review the imposition of sanctions. As a result, Sachsel suggests the practice of law itself is seriously compromised.[7] In particular, Sachsel criticizes the abuse of

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(6 continued) to Defendant's Motion for Summary Judgment ("Opposition"). The Fourth Circuit found no abuse of discretion and affirmed the imposition of sanctions based upon the District Court's rationale.

[7] Sachsel complains that he has been professionally damaged in that he is denied admission to practice in the Supreme Court as a result of being sanctioned under Rule 11. Rule 11 sanctions and the associated consequences are intended to deter improper conduct by an attorney. Unfortunately, in this case, the sanctions imposed have not even slowed the onslaught of litigation generated by Sachsel and Hooper.

discretion standard this Court set in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), as "illogical" (Br. 24). Sachsel theorizes that had he declined to challenge Respondents' summary judgment motion, he would have been subject to sanctions for failing zealously to represent his client (Br. 24). He misses the point.

A lawyer has a duty not only to his client, but to the Court and to the Bar. He is charged with the protection of the orderly administration of justice. Inherent in these responsibilities is the duty to pursue only those causes which have merit. To that end, a realistic analysis of the merits of a case is essential at every step of the process. Members of the public depend on lawyers for legal direction. Declining to pursue an unsupported or legally meritless matter is as important for a lawyer doing his job as zealously pursuing a supported or meritorious one.

An attorney's signature on a pleading is a good faith certification that an appropriate pre-filing investigation has revealed a meritorious cause of action. Sachsel's arguments in the Opposition lacked the good faith required under Rule 11. In fact, the District Court stated that while Hooper may have had "a glimmer of hope," Sachsel, who *knew* the applicable law, "should have had no realistic hope" (A. 64).

In any event, this issue is inappropriate for review by this Court. The Supreme Court's jurisdictional threshold

of " 'special and important reasons' impl[ies] a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. at 74. As this Court has made clear,

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues.

Id.

Sachsel claims the Fourth Circuit lacked a sufficient record with which to evaluate the District Court's imposition of sanctions. He makes this remarkable claim despite the fact that the record sent to the Fourth Circuit included a 1499 page appendix, replete with "evidence" of the baselessness of the lawsuit. The Fourth Circuit did not need the District Court to spell out in block letters the support for its "abiding conviction" that Sachsel's motives in filing the Opposition were improper. The Opposition itself, replete with arguments wholly inconsistent with existing law and based upon insufficient factual support, was "evidence" enough.

Incredibly, Sachsel suggests that Hooper's offer of settlement was confirmation of the genuine motivation driving the litigation. Respondents had the right to challenge unsupported and unjust accusations and allegations. They had the right to refuse to settle a baseless claim. They had the right (albeit not the desire) to expend

financial resources on their legal defense. They had no desire to reward Hooper or otherwise to condone Sachsel's frivolous pursuit of Hooper's frivolous cause of action. Sachsel's argument is essentially that a lawyer (and his client) can sue a party baselessly, and shield themselves from Rule 11's restrictions on such conduct merely by offering to settle the case for money. This is like a kidnapper saying he should not be charged with a crime because he was willing to release his victim if the ransom had been paid.[8]

In Question II B, Sachsel, in conclusory fashion attacks the District Court's imposition of sanctions for signing the Motion for Partial Vacation of Order of June 30, 1993 ("Motion"). Additionally, he disagrees with the Fourth Circuit's decision to affirm.[9] His primary contention is that Rule 11 does not authorize such a sanction.

Rule 11 specifically states that a pleading must not be "interposed for any improper purpose" (A. 199). Sachsel chose to bring his action in the District Court. He then waited until the action was disposed of *before demanding* the Court decline the very jurisdiction Sachsel invoked when

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[8] Sachsel's entire argument about the settlement discussions is inadmissible, and should be stricken. Rule 408, Federal Rules of Evidence.

[9] Sachsel fails to allege any error by the Fourth Circuit in affirming the District Court sanctions.

he filed the action. The District Court believed (correctly) that Sachsel had "played a game" with the legal system (A. 74). Sachsel's "improper purpose" is clear. The Court of Appeals agreed. Again, no "special or important" reason is given for why the Supreme Court should review the actions of the courts below, with regard to the sanction issue raised by Petitioner in Question II B. A review by the Supreme Court is unwarranted.

CONCLUSION

Petitioners have failed to present any issue sufficient to invoke the jurisdiction of the Supreme Court of the United States. For that reason, and for all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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